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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RICHARD ROLAND MEDEIROS, Defendant and Appellant.	G042120 (Super. Ct. No. FMB007584) O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County, Rodney A. Cortez, Judge. Affirmed.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Richard Roland Medeiros of second degree murder (Pen. Code, § 187, subd. (a) (count 1); all further statutory references are to this code unless specified), and gross vehicular manslaughter while intoxicated (§ 191.5, subd. (a) (count 2).) The charges arose from a fatal automobile crash occurring while defendant drove under the influence of alcohol and marijuana. In a bifurcated proceeding, the trial court found defendant suffered three prior convictions for driving under the influence (DUI) of drugs or alcohol (§ 191.5, subd. (d)). Defendant complains of instructional error, and challenges the sufficiency of evidence to support his convictions. For the reasons stated below, we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

At about 6:30 a.m. on May 22, 2005, defendant was driving eastbound on Route 62 near the City of Twentynine Palms. Kelly Beltran, defendant's girlfriend, sat in the passenger seat. She was not wearing a seatbelt. Route 62 consists of a single lane in each direction with a soft 10-foot wide sand shoulder on either side. Beyond the shoulders, berm or mounds of earth border open desert. The legal speed limit along this stretch was 65 miles per hour.

Defendant veered into the sand shoulder and drove for approximately 400 feet, at one point traveling 77 miles per hour. He might have been driving faster when he left the roadway. He steered the truck back to the road and went into a 20-degree angle slide across both lanes, and collided with the berm beyond the opposite shoulder. The truck went airborne, flipped over repeatedly, and expelled Beltran through the right-front window, probably rolling over her. Beltran suffered fatal injuries.

Paramedics arriving at 7:30 a.m. found Beltran's body and defendant sitting against the driver's side door of the truck. Defendant had sustained injuries to the back of his head and was bleeding. The firemen found no evidence of alcohol or drugs around the truck but a fire captain smelled alcohol on defendant's breath. When asked about his condition, defendant responded, "'How the fuck do you think I'm doing? I just killed my girlfriend.'" He became combative and verbally abusive. After fire personnel administered oxygen and fluids, defendant calmed down and became more alert and oriented.

Fire personnel retrieved two blood samples from defendant. At 8:09 a.m., defendant's blood alcohol concentration level (BAL) registered 0.12 percent. At 9:10 a.m. his BAL was 0.10 percent. Hospital staff took two more blood samples, at 10:41 a.m. and 10:42 a.m. revealing 0.07 percent. The blood samples also revealed marijuana in his system. An expert determined defendant's BAL at the time of accident was .15 or .16 percent and opined it is unsafe for anyone to drive with a BAL above .08 percent because it impairs the driver's vision and ability to perform multiple tasks. Marijuana increases the impairment.

Defendant told paramedics he and Beltran had been partying until midnight in Big Bear, about 80 to 100 miles from the crash scene, and he had been driving all night without stopping to rest. He had intended to end up at the coast but was heading in the wrong direction and did not know where he was going.

Defendant admitted two prior DUI convictions. In fact, defendant had suffered three prior DUI convictions, in 1989, 1995 and 2003. He was also convicted of speeding in 2001 and 2002. In conjunction with the prior DUI's, defendant attended and completed court-ordered DUI rehabilitation programs, defensive driving classes, and

Alcoholics Anonymous (AA) meetings. In addition, defendant attended traffic school and suffered a suspended license for six months.

Jail authorities intercepted a telephone call between defendant and a friend. Defendant admitted several times he "fucked up," complaining, "I lost my truck. I lost everything." Defendant admitted he drank tequila before driving, explaining, "I know I would have been fine if I was just drinking cervesa[*sic*], you know, it would be no problem. But I fucking was drinking tequila, dude. And, that, every time — Ricardo Loco." He told the friend he got lost and passed out.

The court sentenced defendant to a 15-year to life term for second degree murder, and imposed and stayed (§ 654) an identical term for gross vehicular manslaughter while intoxicated.

II

DISCUSSION

A. *Sufficient Evidence of Murder*

Defendant challenges the sufficiency of the evidence to support his conviction for second degree murder. Specifically, he contends no substantial evidence shows he knew his conduct endangered human life or he acted in conscious disregard for life. (*People v. Watson* (1981) 30 Cal.3d 290, 296-297, 300 (*Watson*).)

We review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence, defined as evidence that is "reasonable, credible, and of solid value." (*People v. Elliott* (2005) 37 Cal.4th 453, 466.) The test is whether substantial evidence supports the verdict, not whether the evidence proves guilt beyond a reasonable doubt. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) This places "an enormous burden" on a defendant challenging the sufficiency of the

evidence. (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.) We must affirm the judgment below unless "upon no hypothesis whatever is there sufficient substantial evidence to support it." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

In *Watson*, the court found "malice may be implied when defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life. [Citation.]" (*Watson, supra*, 30 Cal.3d at 300; *People v. Knoller* (2007) 41 Cal.4th 139 [malice implied when killing is proximately caused by an act, the natural consequences of which are dangerous to life, and the act was deliberately performed by a person who knows his conduct endangers the life of another and who acts with conscious disregard for life].)

Courts have relied on a number of factors in determining whether the evidence is sufficient to sustain a drunk driving murder conviction: "(1) a blood-alcohol level above the .08 legal limit; (2) a predrinking intent to drive; (3) knowledge of the hazards of driving while intoxicated; and (4) highly dangerous driving." (*People v. Talamantes* (1992) 11 Cal.App.4th 968, 973.) No specific combination of factors is required to prove implied malice and a "case-by-case" approach is applied. (*People v. Olivas* (1985) 172 Cal.App.3d 984, 989.)

Ample evidence supports the jury's verdict. The physical component of the crime of implied malice murder was satisfied by evidence defendant elected to drive late at night after drinking and smoking marijuana, and then drove erratically in darkness at excessive speed down a country road with approximately twice the legal limit of alcohol in his system. This conduct created a substantial risk that someone would be killed. (See *People v. Brogna* (1988) 202 Cal.App.3d 700, 709 [act of drinking and driving under the influence creates risk an intoxicated driver will act or fail to act in a manner that

proximately causes a death]; *People v. McCarnes* (1986) 179 Cal.App.3d 525, 532 [DUI is unlawful because it is dangerous].)

Defendant asserts the evidence showed he fell asleep just before he veered onto the sand. He claims he woke up, realized what had happened, and then turned the truck back onto the road. He claims his sleepiness was caused by driving late at night, unrelated to alcohol and drug ingestion. As already noted, driving while highly intoxicated down a public highway creates a substantial risk that someone will be killed. Whether defendant fell asleep just before the accident, and whether his fatigue was caused in whole or in part by intoxication, is beside the point. Defendant's act of driving over the speed limit after drinking and smoking marijuana while fatigued was an act highly dangerous to human life.

Defendant argues the "death associated with this accident had more to do with the construction of the road than [defendant's] drug and alcohol consumption" because "the road provides drivers with no margin in which to avoid the sand if they momentarily doze off, stop paying attention to the road, or swerve to avoid an obstacle." The jury, however, reasonably could conclude defendant's inebriation impaired his ability to keep his truck on the road and caused him to speed excessively in failing to properly steer the vehicle safely back onto the highway.

Defendant also claims driving through the desert late at night lessened the element of high probability that his act posed a substantial risk of death to others. But even if no one else was on the road, the jury reasonably could conclude his dangerous acts posed a substantial risk of death to his passenger.

As for the subjective element of the crime, defendant had suffered three prior DUI convictions and completed the necessary education programs. The programs

exposed him to lectures and videos explaining the dangers of DUI. They warned that drunk driving could lead to death. This amply established defendant knew his conduct endangered human life and that he acted in conscious disregard for life. (*People v. Johnson* (1994) 30 Cal.App.4th 286, 291-292 [prior DUI conviction alone sufficient to show defendant knew driving while intoxicated was dangerous, not just unlawful]; *People v. Autry* (1995) 37 Cal.App.4th 351, 359 [convictions alone, even without the educational programs, impressed upon appellant the dangers of drunk driving].)

Defendant does not dispute that information regarding the dangers of driving under the influence was imparted to him but asserts he did not "believe" this information to be true: "An element of 'knowledge,' the mental state at issue here, is *belief*. [Citation.] 'Knowledge' is the *belief in something that is objectively valid or 'to some extent externally justified*.' [Citations.] . . . One who attends drunk driving classes may simply not believe that some or all of the information provided is true or, more likely the case with long-term alcohol users, may not believe all of the negative information regarding the dangers of driving under the influence applies to him." This argument does not warrant extended discussion. Defendant did not testify he did not believe the information he received about the dangers to human life from drinking excessively and driving was not true. In the absence of this specific evidence, it is reasonable for the jury to infer that one who has been informed of a risk to human life and chooses to disregard it acts with implied malice.

B. *Trial Court Did Not Err by Failing to Instruct the Jury Sua Sponte on the Defense of Unconsciousness*

Defendant also contends the court erred by failing to instruct the jury sua sponte on the defense of unconsciousness. (Judicial Council of Cal. Crim. Jury Instns.

(2009), CALCRIM No. 3425;[1] § 26 ["[a]ll persons are capable of committing crimes except those belonging to the following classes [including] [¶] [p]ersons who committed the act charged without being conscious thereof"]; *People v. Rogers* (2006) 39 Cal.4th 826, 887 [an unconscious act within the contemplation of the Penal Code is one committed by a person because of somnambulism, a blow on the head, or similar cause; unconsciousness does not mean that the actor lies still and unresponsive; a person is deemed unconscious if he or she committed the act without being conscious thereof].) A court has a duty to instruct on defenses where there is substantial evidence supportive of such a defense and the defense is not inconsistent with defendant's theory of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 157.) Substantial evidence means evidence which is sufficient to deserve consideration by the jury and which a jury comprised of reasonable persons could conclude the particular facts underlying the instruction existed. (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.)

Defendant did not rely on unconsciousness as a defense and the only evidence supporting the claim was defendant's statement to his friend that he drank too much tequila and fell asleep. Assuming the jury could reasonably infer defendant meant he fell asleep just before the crash, the evidence did not justify an instruction on the defense. "[O]ne who drinks to the point of intoxication, knowing he or she thereafter

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[1] CALCRIM No. 3425 provides, in relevant part: "The defendant is not guilty of _____ <*insert crime*[*s*]> if (he/she) acted while legally unconscious. Someone is legally unconscious when he or she is not conscious of his or her actions. [Someone may be unconscious even though able to move.] [¶] Unconsciousness may be caused by (a blackout[,]/ [or] an epileptic seizure[,]/ [or] involuntary intoxication[,]/ [or] sleepwalking[,]/ or _____ <*insert a similar condition*>). [¶] The People must prove beyond a reasonable doubt that the defendant was conscious when (he/she) acted. If there is proof beyond a reasonable doubt that the defendant acted as if (he/she) were conscious, you should conclude that (he/she) was conscious. If, however, based on all the evidence, you have a reasonable doubt that (he/she) was conscious, you must find (him/her) not guilty."

must drive, exhibits a conscious disregard of the safety of others . . . . 'Defendant had consumed enough alcohol to raise his blood alcohol content to a level which would support a finding that he was legally intoxicated. He had driven his car to the establishment where he had been drinking, and he must have known that he would have to drive it later. It also may be presumed that defendant was aware of the hazards of driving while intoxicated.' [Citation.] . . . [¶] [T]he determination whether a defendant who drives under the influence of alcohol exhibits a conscious disregard of human life does not depend exclusively upon the defendant's state of mind at the time the accident occurs. 'A high level of intoxication sets the stage for tragedy long before the driver turns the ignition key.' [Citation.] [I]n light of defendant's past exposure to the extreme danger posed by driving under the influence of alcohol or drugs, the jury reasonably could conclude that defendant, in undertaking this course of conduct, acted with knowledge of the dangerousness of his conduct and with conscious disregard of that danger. Because defendant knowingly embarked upon such an extremely dangerous course of conduct with conscious disregard of the danger, his malice aforethought would not be negated simply by reason of his having succeeded in rendering himself unconscious prior to the fatal collision. Accordingly, the trial court did not err in refusing defendant's proffered instruction regarding unconsciousness caused by voluntary intoxication." (*People v. Whitfield* (1994) 7 Cal.4th 437, 455 (*Whitfield*).)

In other words, defendant acted with implied malice the moment he got behind the wheel of the car in an intoxicated and fatigued condition. Even if he later passed out, the element of implied malice already had been established. Defendant cites his lawyer's closing argument that mentioned defendant fell asleep just before defendant's car veered off the road. The statement underscored defense counsel's

argument defendant could not have subjectively appreciated the risk, but this comment does not show defendant relied on an unconsciousness defense, especially when viewed in the context of defense counsel's summation. Defendant's lawyer urged the jury to find defendant guilty of gross vehicular manslaughter while intoxicated and he designed his closing remarks to convince the jury this was the appropriate verdict. It is therefore evident that the defense of unconsciousness would have been at odds with defense counsel's strategy. In any event, *Whitfield* foreclosed the option of relying on the defense of unconsciousness.

III
DISPOSITION

The judgment is affirmed.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.